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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RANDY SIMS, Defendant and Appellant.	F057352 (Super. Ct. No. 07CRSP678513) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lloyd G. Carter, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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This appeal is from an order civilly committing appellant Randy Sims to the State Department of Mental Health (Department) for an indeterminate term under what is commonly known as the Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.).[1] Sims challenges the validity of his commitment on numerous constitutional grounds. He also contends the evidence was insufficient to support the jury's finding that he is a sexually violent predator (SVP). Lastly, Sims contends the trial court erred prejudicially when it denied his challenge for cause as to one juror.

We disagree with Sims's contentions, except for his challenge to the indeterminate commitment on equal protection grounds. Based on the California Supreme Court's recent ruling in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*), holding that the 2006 amendments to the SVPA *may* violate equal protection, we affirm in part and reverse in part the trial court's order of commitment. On remand, we will direct the trial court to suspend further proceedings in this case pending finality of the proceedings on remand in *McKee*.

FACTUAL AND PROCEDURAL SUMMARY

On January 5, 1995, Sims pled to committing a lewd and lascivious act by force on a child under the age of 14, a violation of Penal Code section 288, subdivision (a), which is a qualifying prior under the SVPA.

On June 27, 2007, while Sims was at Wasco State Prison, the Fresno County District Attorney's Office filed a petition alleging that Sims was an SVP and seeking to have him civilly committed. A jury trial commenced on the petition on January 7, 2009, but a mistrial was declared on January 12.

A new trial commenced on March 4, 2009. Dr. Dawn Starr, a psychologist who had interviewed Sims in May 2007, testified at the trial. Starr determined that Sims had

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

"fairly severe" developmental difficulties, a general mood disorder, and some psychotic problems. Starr diagnosed Sims as having nonexclusive type pedophilia, a qualifying mental disorder under the SVPA.

Starr based her diagnosis of pedophilia in large part on Sims's history. On April 2, 1984, at approximately the age of 16, Sims tried to force a seven-year-old boy to orally copulate him. On May 5, 1984, Sims took another seven-year-old boy into a basement, pulled down the victim's pants and underwear, massaged the victim's legs, and attempted to lie down on top of the victim. Sims was interrupted when two people happened upon the scene. Sims eventually admitted he took the victim to the basement to "fuck him."

In August 1984, when Sims was 16, he had intercourse with a seven-year-old girl several times and fondled the genitals of the girl's three-year-old brother. For these offenses, Sims was sent to the California Youth Authority and later to Napa State Hospital, where he remained until he was 23 years old. While at Napa State Hospital, Sims had sex with a 13-year-old girl and anal sex with a person who was in a body cast.

On August 31, 1994, Sims asked a seven-year-old girl to join him for milk and cookies. When she did, he pulled off his pants and underwear, attempted to pull off the girl's pants and underwear, and put his penis between her legs. The girl stated that on an earlier occasion Sims had cornered her in a stairwell, pulled down his pants, and rubbed his penis between her legs.

Sims also abused cocaine and had multiple parole revocations for using cocaine. The intellectual tests given to Sims indicated he was "mildly mentally retarded." Sims had some medical problems, including asthma and epilepsy.

Starr analyzed Sims's risk of reoffense using the Static-99 and Static-2002 actuarial tools. Sims's score on the Static-99 placed him in the high risk category; his score on the Static-2002 placed him in the highest risk category. Sims's risk factors included (1) multiple victims, other than the victim of the qualifying offense, (2) prior sex offenses, other than the qualifying offense, and (3) that the victims were unrelated.

Starr opined that Sims presented a serious and well-founded risk of reoffending in a sexually violent manner if released. Sims's age and medical issues would not prevent him from committing sexually violent offenses if released.

Dr. Carolyn Murphy, another psychologist, also evaluated Sims. Murphy diagnosed Sims as having pedophilia and a psychotic disorder not otherwise specified. The unspecified psychotic disorder was diagnosed because Sims exhibited some hallucinations and some false beliefs about his body. Murphy also concluded that Sims had a personality disorder with antisocial traits.

In addition to the Static-99 and Static-2002 tests, Murphy evaluated Sims using the MnSOST-R (Minnesota Sex Offender Screening Tool-Revised), another actuarial tool that looks at different factors than the other two tests. Murphy opined that Sims presented a serious and well-founded risk to reoffend in a sexually violent manner because of the predatory crimes he had committed, the actuarial risk assessment, he previously had violated community release, and he had not completed sex offender treatment.

A third psychologist, Dr. Michael Musacco, also evaluated Sims. Musacco's diagnosis agreed with the other two psychologists -- pedophilia. Musacco also found that Sims's intelligence was in the low borderline range and that Sims had a cocaine dependence. Musacco administered the three actuarial tests and found that Sims scored at or above the high risk range on each of the three tests. Musacco opined that Sims was at high risk of reoffending.

Sims presented testimony from a clinical psychologist, Dr. Raymond E. Anderson. Anderson did not see evidence of a psychotic disorder. Anderson opined that Sims was not a pedophile and that there were no indicators that he was unable to control his behavior. Anderson opined that Sims's risk of reoffense was about five percent and Sims did not present a serious risk of reoffense.

Dr. Jules Burstein, a clinical and forensic psychologist, also evaluated Sims. Burstein found that Sims had a depressive disorder and cocaine dependence, which was in remission. He concluded Sims did not have a mental disorder that predisposed him to commit sexual offenses. Sims was depressed because he had been "locked up a long time" and wanted to be released.

Burstein did not agree with the diagnosis of pedophilia. Burstein opined that statistical tests were "fraught with difficulties." Burstein opined that Sims would be at low risk for reoffending if he participated in substance abuse treatment and sex offender treatment after release.

David Purvis, who has a master's degree in social work, was the director of a nonprofit institute. Purvis provided counseling in various areas, including domestic violence, substance abuse, anxiety disorders, and sex offender counseling. Sims had expressed an interest in Purvis's program. Purvis felt he could work with Sims and that Sims would be an "interesting challenge."

Sims's younger brother, Michael, testified that he had a great relationship with Sims and trusted him around his young son and niece. He also trusted Sims around other people's children. Michael was willing to see that Sims registered as a sex offender and that he attended sex offender and substance abuse treatment. Michael and Sims planned to move to Texas to be near an aunt and uncle once Sims was released.

LaNell Williams operated facilities for sex offenders. Sims previously had been in one of Williams's facilities for about a year. Williams was willing to work with Sims again.

Sims testified on his own behalf. Sims was "very sorry for what [he had] done to [his] victims." He claimed he never fantasized about sex with children. He was in phase one of sex offender treatment at the state hospital when his treatment was interrupted by the trial. He wanted to move to Texas and testified he would behave himself in Texas.

On March 16, 2009, the jury found Sims was an SVP. The trial court ordered Sims committed for an indefinite term.

DISCUSSION

Sims challenges the validity of his commitment on numerous constitutional grounds, including that an indeterminate commitment violates the ex post facto clause, due process, equal protection, double jeopardy, cruel and unusual punishment principles, and denies him access to the courts, in violation of his right to seek redress. He also contends the evidence was insufficient to support the jury's finding that he is an SVP. Lastly, Sims contends the trial court erred prejudicially when it denied his challenge for cause as to one juror.

I. Constitutional Challenges to the SVPA

In 1995 the Legislature enacted the SVPA, which is codified in section 6600 et seq. (Stats. 1995, ch. 763, § 3, p. 5922.) The SVPA provides for the involuntary civil commitment of certain offenders. An offender is eligible for commitment as an SVP if he or she has been convicted of sexually violent offenses (as defined in section 6600, subd. (a)(2)) against one or more victims, and he or she has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent behavior. (*Id*., subd. (a)(1).) A "diagnosed mental disorder" is defined as a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (*Id*., subd. (c).)

In 2006, the SVPA was amended to provide for an indeterminate term of commitment, instead of a determinate term of commitment. (§ 6604, as amended by Stats. 2006, ch. 337, § 55, eff. Sept. 20, 2006; Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006), § 27, eff. Nov. 8, 2006.) Several of the issues raised by Sims here focus on the 2006 changes to the SVPA.

A. Double jeopardy, ex post facto and cruel and unusual punishment

After *McKee*, the law is settled that an indeterminate SVPA commitment, even after the 2006 amendments, is a civil matter imposing no punishment. (See *McKee, supra*, 47 Cal.4th at pp. 1193-1195 [the 2006 amendments do not render the statutory scheme punitive and "accordingly do not violate the ex post facto clause"]; see also *Collins v. Youngblood* (1990) 497 U.S. 37, 43 [the ex post facto clause prohibits only those laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts"]; *People v. Vasquez* (2001) 25 Cal.4th 1225, 1231 [the SVPA is "protective rather than punitive in its intent"]; *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1179 [the SVPA neither imposes punishment nor otherwise implicates ex post facto concerns].)

The Eighth Amendment's prohibition on cruel and unusual punishment prohibits those convicted of crimes from being physically punished by barbarous methods. (*Estelle v. Gamble* (1976) 429 U.S. 97, 102-103.) While the SVPA results in a loss of freedom, Sims is not a prisoner and the SVPA is not punitive in nature. (*People v. Chambless* (1999) 74 Cal.App.4th 773, 776, fn. 2 (*Chambless*) [since SVPA is not punitive and does not impose liability or punishment for criminal conduct, cruel and unusual punishment claim fails].) Therefore, the Eighth Amendment's prohibition on cruel and unusual punishment is inapplicable. (See *McKee, supra,* 47 Cal.4th at pp. 1194-1195.)

Likewise, a civil commitment procedure does not constitute a second prosecution for purposes of the double jeopardy clause. (*Kansas v. Hendricks* (1997) 521 U.S. 346, 369 (*Hendricks*).) As discussed *ante*, the SVPA, as amended by Proposition 83, remains civil, not punitive, in nature. (*McKee, supra*, 47 Cal.4th at pp. 1194-1195.) Because Sims's commitment is civil in nature, it does not run afoul of the double jeopardy clause. (*Chambless, supra,* 74 Cal.App.4th at p. 776, fn. 2 [double jeopardy claim fails because SVPA does not impose punishment for criminal conduct].)

So Sims's double jeopardy, ex post facto, and cruel and/or unusual punishment arguments fail.

B. Due process

Likewise, the law is settled that an indeterminate SVPA commitment, even after the 2006 amendments, does not violate due process. (*McKee, supra*, 47 Cal.4th at pp. 1188-1193; see also *Hendricks, supra*, 521 U.S. at p. 357 [involuntary civil confinement of a limited subclass of dangerous persons with proper procedures and evidentiary standards is not "contrary to our understanding of ordered liberty"]; *Foucha v. Louisiana* (1992) 504 U.S. 71, 77 [due process allows holding a civil committee "as long as he is both mentally ill and dangerous, but no longer"]; *Jones v. United States* (1983) 463 U.S. 354, 366-368 [imposing the burden of proof by a preponderance of the evidence that a committee with an indeterminate commitment is not guilty by reason of insanity "comports with due process"].)

A commitment under California's SVPA is "only potentially indefinite" due to the requirement of an annual review. (*Hendricks, supra*, 521 U.S. at p. 364.) Section 6605 provides that a current mental health examination shall be conducted each year to determine whether the person currently meets the definition of an SVP. (*Id.*, subd. (a).) The results are to be filed with the trial court and served on the committed person. (*Ibid*.) If it is determined that the person no longer meets the definition of an SVP, or if the person can be released conditionally, then a petition for this type of discharge or conditional release is to be filed. (*Id.*, subd. (b).) At the hearing on this petition, the committed individual has the right to appointed counsel, the right to a jury trial, and the right to an appointed expert. (*Id*., subd. (d).) In addition, the state has the burden of proving beyond a reasonable doubt that the SVP is to remain committed. (*Ibid*.)

If at any time the Department has reason to believe the person committed is no longer an SVP, it must seek judicial review of the commitment. (§ 6605, subd. (f).) If the Department does not certify that the person should be discharged or conditionally

released, the committed person can file a petition seeking conditional release or discharge. (*Id.*, subd. (a).) Section 6608, subdivision (i) provides that in any hearing on a petition filed under this section, the petitioner has the burden of proof by a preponderance of the evidence. The annual review and the numerous methods by which a committed person may seek discharge or conditional release under California's scheme (§ 6608) assures that an individual remains committed only as long as he or she meets the statutory definition of an SVP and that constitutional requirements are satisfied. (See *Hendricks, supra,* 521 U.S. at pp. 364-365.)

Sims's challenge to his commitment on due process grounds also fails. (*McKee, supra,* 47 Cal.4th at p. 1193.)

C. Equal protection

Sims's equal protection challenge, on the other hand, arguably is meritorious. (*McKee, supra,* 47 Cal.4th at pp. 1196-1208.) Sims contends that he has been denied equal protection because SVP's receive treatment disparate from other similarly situated persons, specifically, mentally disordered offenders (MDO) subject to commitment under the Mentally Disordered Offenders Act (Pen. Code, § 2960 et seq.) or those civilly committed because they were found not guilty of a crime by reason of insanity (NGI). (*Id.*, § 1026 et seq.)

In *McKee,* the California Supreme Court held that SVP's are similarly situated to other civilly committed persons, including MDO's and NGI's. Therefore, absent a showing of a compelling state interest in treating SVP's significantly less favorably than MDO's and NGI's, California's SVPA *may* violate the equal protection clause of the United States Constitution. (*McKee, supra,* 47 Cal.4th at pp. 1203, 1207.) The *McKee* court remanded the case to the trial court to determine whether the People could establish a compelling interest justifying its disparate treatment of SVP's and whether such treatment is necessary to further its interest. (*Id.* at pp. 1207, 1210.)

The *McKee* court stated that "the government has not yet shown that the special treatment of SVP's is validly based on the degree of danger reasonably perceived as to that group, nor whether it arises from any medical or scientific evidence. On remand, the government will have an opportunity to justify Proposition 83's *indefinite commitment provisions*, at least as applied to McKee, and demonstrate that they are based on a reasonable perception of the unique dangers that SVP's pose rather than a special stigma that SVP's may bear in the eyes of California's electorate." (*McKee, supra,* 47 Cal.4th at p. 1210, italics added.)

In *McKee,* the California Supreme Court remanded the matter to the trial court to determine whether the People could demonstrate "the constitutional justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment." (*McKee, supra,* 47 Cal.4th at p. 1208.) *McKee* does not explain whether the justification will be a one-time finding, forever applicable to all SVP's committed under the statutory scheme, or whether in every case there must be justification for treating a particular SVP differently than MDO's and NGI's. The opinion appears to contemplate a categorical justification with its citation in footnote 9 to Department of Justice studies and the like. (*Id.* at p. 1206, fn. 9.) *McKee,* however, also suggests in footnote 10 that there may be classes of SVP's that pose a greater risk to particularly vulnerable victims, such as children. (*Id.* at p. 1208, fn. 10.)

In any event, until we receive further direction from the California Supreme Court, we will remand this matter to the trial court to determine whether sufficient justification has been shown for treating SVP's differently than MDO's and NGI's, but will suspend further proceedings pending finality of the proceedings on remand in *McKee.*

D. Right to petition

Sims's last constitutional challenge is that his First Amendment right to petition the courts has been infringed by the amended SVPA. "The First Amendment to the United States Constitution protects the right 'to petition the Government for a redress of

grievances.' This includes the right of access to the courts. [Citation.]" (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 162.)

Sims's contention is two-fold. First, because section 6605, subdivision (b) provides that an SVP may petition for release only with the concurrence of the director of the Department, Sims contends the right to petition for redress of grievances is impaired. Second, Sims claims the right to petition under section 6608, subdivision (a) is not meaningful because it does not provide for the appointment of medical experts.

Sims's statement that a petition under section 6605, subdivision (b) requires the concurrence of the director of the Department is accurate. This does not mean, however, that his First Amendment right is impaired. Because Sims has an unfettered right to petition for release under section 6608, subdivision (a), his First Amendment right to petition for redress of grievances is unimpaired.

Sims's claim that section 6608 does not grant an SVP meaningful access to the courts is not persuasive. The current version of the statute, as amended by Proposition 83, reads, "Nothing in this article shall prohibit the person who has been committed as a sexually violent predator from petitioning the court for conditional release or an unconditional discharge without the recommendation or concurrence of the Director of Mental Health." (§ 6608, subd. (a).) Any petition filed under section 6608 is subject to dismissal only if the trial court finds it is based on frivolous grounds, an extremely narrow and limited basis for dismissal. (*Id.*, subd. (a).)

Sims acknowledges he is entitled to the assistance of counsel in proceedings under section 6608. He contends that access to the courts is not meaningful because there is no provision for appointment of a medical expert to assist in proving the SVP should no longer be committed. Sims is mistaken.

He is not prohibited from the use of expert witnesses, including retaining experts pursuant to section 6605, subdivision (d), and a trial court is mandated to appoint medical

experts to assist an SVP who petitions for release under section 6608. The court in *McKee* stated:

> "Given that the denial of access to expert opinion when an indigent individual petitions on his or her own to be released may pose a significant obstacle to ensuring that only those meeting SVP commitment criteria remain committed, we construe section 6608, subdivision (a), read in conjunction with section 6605, subdivision (a), to *mandate* appointment of an expert for an indigent SVP who petitions the court for release." (*McKee, supra,* 47 Cal.4th at p. 1193, italics added.)

Sims also has the right to seek release by way of a petition for writ of habeas corpus. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 404-405.)

Thus, Sims's First Amendment right to petition for redress of grievances is preserved and unfettered under the amended SVPA.

II. Sufficiency of the Evidence

In reviewing the sufficiency of the evidence of an SVP commitment determination, we apply the same standard of review used in criminal proceedings. (*Chambless, supra,* 74 Cal.App.4th at p. 787; *People v. Mercer* (1999) 70 Cal.App.4th 463, 466 (*Mercer*).) "Thus, this court must review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] To be substantial, the evidence must be '"of ponderable legal significance … reasonable in nature, credible and of solid value."' [Citation.]" (*Mercer*, at p. 466.) "It is not the role of this court to redetermine the credibility of experts or to reweigh the relative strength of their conclusions." (*People v. Poe* (1999) 74 Cal.App.4th 826, 831 (*Poe*).)

Analysis

A person may be civilly committed as an SVP under the SVPA upon proof beyond a reasonable doubt that the person (a) has been convicted of one or more predicate sex offenses as defined in the statute, and (b) "has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will

engage in sexually violent criminal behavior." (§§ 6600, subd. (a)(1), 6604.) The jury "must conclude that the person is 'likely' to reoffend if, because of a current mental disorder which makes it difficult or impossible to restrain violent sexual behavior, the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 922.) This standard requires "much more than the mere *possibility* that the person will reoffend," but it does not call for "a precise determination that the chance of reoffense is *better than even*." (*Ibid.*)

The parties stipulated that Sims had suffered the qualifying predicate offense. Starr and Murphy opined that Sims suffered from the mental disorder of pedophilia—a diagnosis that Sims apparently does not dispute. Sims challenges the sufficiency of the evidence establishing the third element—that he was likely to engage in sexually violent criminal behavior if released into the community.

Drs. Starr, Murphy, and Musacco opined that there was a substantial and serious risk that Sims would reoffend in a sexually violent manner. Drs. Anderson and Burstein opined to the contrary. A conflict between or among expert witnesses does not, by itself, undermine the sufficiency of the evidence supporting a verdict. (See *People v. Dunkle* (2005) 36 Cal.4th 861, 889.)

The type of expert testimony presented by the People in this case consistently has been held admissible on issues of future dangerousness. (See, e.g., *People v. Ward* (1999) 71 Cal.App.4th 368, 373-374.) In finding that Sims satisfied the criteria for continued confinement, the jury necessarily rejected his experts' contentions that he was not likely to reoffend. The credibility and weight of the expert testimony was for the jury to determine, and it is not up to us to reevaluate it. (*Poe, supra,* 74 Cal.App.4th at p. 831; *Mercer, supra*, 70 Cal.App.4th at pp. 466-467.)

Sims also claims the evidence was so heavily skewed toward his past crimes, conduct, and evaluations that the evidence was insufficient to show current

dangerousness. He relies on *People v. Munoz* (2005) 129 Cal.App.4th 421, 429 (*Munoz*). *Munoz* is inapposite for three reasons.

First, it was not a sufficiency of evidence case. The court did not dismiss the petition for insufficiency of evidence but, instead, reversed the commitment order because the evidence and argument by the People's counsel was prejudicial in its focus on Munoz's past status as an SVP. (*Munoz, supra,* 129 Cal.App.4th at p. 432 ["Nothing must be done to suggest the defendant is required to prove he is no longer an SVP or to effectively lessen the state's burden by establishing a [baseline] of mental disorder and dangerousness. [¶] … The manner in which the prosecutor questioned witnesses, the evidence the trial court admitted, and the manner in which petitioner argued the case suggested that the issue was whether anything had changed since appellant's prior SVP commitment"].)

Second, while it is true that the experts testified about Sims's past, the testimony clearly focused on the manner in which those historical factors related to Sims's current condition, including that Sims had not completed sex offender treatment, previously had violated community release, the nature of his offenses, and his current medical conditions. The expert witnesses addressed Sims's current therapeutic activities and results, as well as many other facets of his current life.

Third, unlike *Munoz*, the present case concerns an initial commitment; therefore, no improper focus on a past determination of SVP status could have occurred.

Sims's claim that the evidence was insufficient to establish a likelihood that he would reoffend fails.

III. Juror Challenge

Sims challenged Prospective Juror S. for cause, which challenge was denied. He then exercised a peremptory challenge to excuse her from the jury. Later, defense counsel objected to the denial of his challenge for cause and to the jury as constituted, stating he had used all his peremptory challenges and could have used the peremptory on

another juror he had concerns about if Prospective Juror S. had been removed for cause. Sims thus has preserved this issue for appeal. (*People v. Millwee* (1998) 18 Cal.4th 96, 146 ["To preserve a claim of error in the denial of a challenge for cause, the defense must exhaust its peremptory challenges and object to the jury as finally constituted"].)

Standard of review

"[T]he qualification of jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal. [Citation.] To find actual bias on the part of an individual juror, the court must find 'the existence of a state of mind' with reference to the case or the parties that would prevent the prospective juror 'from acting with entire impartiality and without prejudice to the substantial rights of either party.' [Citation.]" (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 944, quoting Pen. Code, former § 1073, now Code Civ. Proc., § 225, subd. (b)(1)(C).)

When a juror gives conflicting or equivocal testimony as to his or her capacity for impartiality, the determination of the trial court as to the juror's state of mind is binding on the appellate court. (*People v. Maury* (2003) 30 Cal.4th 342, 376; *People v. Kaurish* (1990) 52 Cal.3d 648, 675 (*Kaurish*).) If the prospective juror's statements are consistent, the trial court's ruling will be upheld if supported by substantial evidence. (*Maury*, at pp. 376-377.)

Before this court "will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' The court will not presume bias, and will uphold the trial court's exercise of discretion … under [Penal Code] section 1089 if supported by substantial evidence. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 659.)

Analysis

Before granting or denying a challenge for cause concerning a prospective juror, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would """"prevent

or substantially impair’”””” the performance of his or her duties. (*People v. Ochoa* (2001) 26 Cal.4th 398, 431.) “Demonstrated bias in the responses to questions on voir dire may result in a juror’s being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.” (*In re Hitchings* (1993) 6 Cal.4th 97, 111.)

Prospective Juror S. answered a written questionnaire and was extensively questioned during voir dire. Prospective Juror S. was married, was a registered pediatric nurse, and was the co-owner of three homes for medically fragile children. Her husband was a chaplain for the Fresno City Police Department. Prospective Juror S.’s daughter, now an adult, had been sexually molested at eight years of age by a foster child in the home. The molestation was reported to law enforcement. The foster child was arrested and was required to register as a sex offender.

Prospective Juror S. answered “no” to the question of whether she believed sex offenders with multiple convictions should not be released from custody, explaining she hesitated to “give up” on people. She also did not believe that all people who behaved in a sexually inappropriate way with a child automatically had a mental disorder. She believed that in some cases sex offenders could be rehabilitated if they received treatment and were motivated.

Prospective Juror S. acknowledged that she had formed a “soft opinion -- hopefully flexible” about the case. She also stated she would rather not sit on the case because she would be affected by what had happened to her daughter. She also commented, “I would hope I could have an open enough mind to be fair.” Prospective Juror S. stated that she would have “sympathy for the victims --especially children,” but hoped she “could remain unbiased -- but [was] not completely sure.”

When asked if she thought she could be an impartial juror, Prospective Juror S. stated she was “honestly not quite sure” and would “have to wait and see” if she could sit

as an impartial juror. She was not sure "how decisive" she could be and was not sure she could serve "without having my own experiences be entangled."

When asked whether she could accept and analyze the testimony of witnesses and make a determination on the validity of the petition based on the testimony, Prospective Juror S. stated, "I think I can."

Although other judges faced with similar conflicting comments from a prospective juror may have removed her for cause, it was for the trial court to decide her fitness to serve. (*Maury, supra,* 30 Cal.4th at p. 376; *Kaurish, supra,* 52 Cal.3d at p. 675.) In *Kaurish*, for example, the trial court denied the defendant's for-cause challenge to a prospective juror who, in the words of the Supreme Court, "gave conflicting testimony as to her ability to be unbiased." (*Kaurish,* at p. 675.)

Similarly, in *People v. Hillhouse* (2002) 27 Cal.4th 469, a prospective juror gave what the Supreme Court described as "equivocal and somewhat conflicting" statements. (*Id*. at p. 488.) The juror wrote in a questionnaire that, based on what he had read in the newspapers, he believed the defendant was guilty. And he acknowledged the investigator for the prosecution was a friend of his. In short, "He made clear that he had preconceptions about the case, but he also understood he had to base his decision on the evidence at trial rather than what he read in the newspapers, and he said he would try to be impartial." (*Ibid.*) The Supreme Court upheld the trial court's order denying the defendant's challenge for cause:

> "On this record, the trial court could reasonably conclude the juror was trying to be honest in admitting to his preconceptions but was also sincerely willing and able to listen to the evidence and instructions and render an impartial verdict based on that evidence and those instructions. Indeed, a juror like this one, who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so. A reviewing court must allow the trial court to make this sort of determination. The trial court is present and able to observe the juror itself. It can judge the person's sincerity and actual

> state of mind far more reliably than an appellate court reviewing only a cold transcript. We see no basis on which to overturn the trial court's determination that this juror could be impartial." (*Id.* at pp. 488-489.)

We reach the same conclusion in the present case. Here, Prospective Juror S.'s comments indicated a person who was being thoughtful and honest in answering the juror questionnaire and voir dire questions. She showed an awareness of her own potential bias but indicated she would listen to and accept the testimony of witnesses and try to remain openminded and fair. She stated she would have sympathy for the victims, but she hoped she could remain unbiased. As in *Hillhouse,* we see no basis upon which to overturn the trial court's determination that Prospective Juror S. could be impartial.

DISPOSITION

The order for commitment finding Sims to be an SVP within the meaning of section 6600 et seq. and committing him to the custody of the Department is affirmed, except as to the commitment for an indeterminate term. In light of the holding in *McKee*, the matter is remanded to the trial court for reconsideration of Sims's argument that an indefinite commitment violates equal protection, with directions to the trial court to hold proceedings and to resolve the issue of whether the People can prove a factually based justification for treating SVP's differently than MDO's and NGI's. The trial court, however, shall suspend further proceedings in Sims's case pending finality of the proceedings on remand in *McKee.* (*McKee, supra,* 47 Cal.4th at pp. 1208-1210.)

"Finality of the proceedings" in *McKee* shall include the finality of any subsequent appeal and any proceedings in the California Supreme Court.

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CORNELL, Acting P.J.

WE CONCUR:

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HILL, J.

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KANE, J.